FILE COPY

No. 227

In the Supreme Court of the United States

OCTOBER TERM, 1938

INLAND STEEL COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND INDIANA HARBOR BELT RAILROAD COMPANY

No. 228

CHICAGO BY-PRODUCT COKE COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BELT RAILWAY COMPANY OF CHICAGO, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF ON BEHALF OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

DECEMBER 1938.

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OPINIONS

The opinion of the specially-constituted District Court (R. 81) sustaining six terminal allowance

orders of the Interstate Commerce Commission (consolidated for hearing) is reported in 23 F. Supp. 291. Although, as stated by the lower court, "the issue in each is substantially the same" and further that "the suits are of the precise character of those considered in *United States et al.* v. *American Sheet & Tin Plate Co., et al.*, 301 U. S. 402," (R. 81) appeals have been taken in only two of the cases, these involving the Commission's Nineteenth Supplemental Report, *Inland Steel Company Terminal Allowance,* 209 I. C. C. 747 (R. 66) and its Fifty-sixth Supplemental Report, *Chicago By-Product Coke Company Terminal Allowances,* 216 I. C. C. 8 (R. 118).[1]

The general report of the Commission (R. 14) announcing certain governing principles is reported in Ex Parte No. 104, *Practices of Carriers Affecting Operating Revenues or Expenses, Terminal Services,* 209 I. C. C. 11. Supplemental reports, in connection with which were entered the

[1] The opinion of the District Court in the consolidated cases, as shown by its decision (R. 83–85; R. 86; R. 87–88; R. 89–90) included the Commission's Thirty-third Supplemental Report, *Interlake Iron Corporation, Duluth, Minn., Terminal Allowance,* 210 I. C. C. 205; the Thirty-fourth Supplemental Report of the Commission, *Crane Company Terminal Services,* 210 I. C. C. 210; the Fifty-second Supplemental Report, *Acme Steel Company Terminal Allowance,* 215 I. C. C. 373, and the Fifty-seventh Supplemental Report, *American Steel Foundaries Terminal Allowances,* 216 I. C. C. 13, but no appeals have been taken in these four cases.

orders involved in the two cases on appeal, are cited in the preceding paragraph.

JURISDICTION

The final decrees of the District Court were entered on April 27, 1938, in both the *Inland Steel Company Case* (R. 93) and in the *Chicago By-Product Coke Company Case* (R. 135). Motions to modify the final decrees in the two cases were filed on May 25, 1938 (R. 94; R. 136) and were denied by the court without opinion on June 13, 1938, in both cases (R. 101; R. 175). Petitions for appeal were filed on June 24, 1938, (R. 101; R. 175) and were allowed by the District Court on the same day (R. 103; R. 177). The jurisdiction of this court is founded upon the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 203, 219, 220 (U. S. C., Title 28, Secs. 45 and 47a, Supp. III), and Section 283 of the Judicial Code, as amended by Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345). Probable jurisdiction was found by this court on October 10, 1938.

QUESTIONS

The District Court in the exercise of discretion vested in it, granted injunctions temporarily enjoining the operation of two orders of the Commission directing carriers serving the plants of the Inland Steel Company at Indiana Harbor, Ind., (R. 70) and of the Chicago By-Product Coke Com-

pany at Chicago, (R. 124) to cease and desist from paying allowances to those industries for performance by the latter of spotting services within the plants. By the interlocutory decree, dated August 28, 1935, in the *Inland Steel Case,* (R. 78) the carrier serving that plant was directed to set up on its books of account any and all sums due and payable to the industry under the allowance tariff, "which sums so set up shall be paid over to plaintiff or canceled, only upon the further order of this Court" (R. 80). The decree in the *Chicago By-Product Coke Company Case* (R. 131) dated December 2, 1936, directed the railroads "until the further order of the court" (R. 132) "to withhold payment of the allowances covered by their tariffs to the plaintiff" (R. 132). While the injunctions were in full force and effect from and after August 28, 1935, and December 2, 1936, respectively, the Commission issued supplemental orders postponing the effective date of compliance therewith until June 15, 1937, but refusing to modify the orders in any other particular. The important question presented is whether the orders of the Commission, purporting to postpone the effective dates of its prior orders, confer any rights upon the industries to the impounded funds, in view of the complete assumption and exercise of jurisdiction by the Court in issuing interlocutory injunctions "during the pendency of this matter" (R. 79; 132).

Another question presented is whether appellants, after availing themselves of the benefits of the interlocutory injunctions granted in 1935, and in 1936, on their motion (R. 78; 131), can on April 28, 1938, attack those interlocutory injunctions as being erroneous in fact and in law on the allegations that (1) the court received no evidence and made no findings of fact upon which it could base such decrees, and (2) the court had no jurisdiction to set aside the terms of the tariffs and had no power to command a departure therefrom (R. 96; R. 139).

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the appendix.

STATEMENT

These cases present direct appeals by the Inland Steel Company and the Chicago By-Product Coke Company from a portion of final decrees, dated April 27, 1938, of the U. S. District Court for the Northern District of Illinois, Eastern Division (R. 93; 135) sustaining the Commission's orders in all respects, and from orders denying motions to modify the final decrees, dated June 13, 1938 (R. 101; 175).

The cases are an outgrowth of the Commission's investigation in Ex Parte No. 104, *Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services,* 209 I. C. C. 11 (R. 14). Following the Commission's general re-

port, supplemental reports were issued covering the services rendered by common carriers subject to the Interstate Commerce Act in the spotting and switching of cars at particular plants. Many of these supplemental reports and orders have been sustained by this Court (*United States* v. *American Tin Plate Company,* 301 U. S. 402; *Goodman Lumber Co.* v. *United States,* 301 U. S. 669; *A. O. Smith Corp.* v. *United States,* 301 U. S. 669, and *United States* v. *Pan American Corporation,* 304 U. S. 156). The supplemental reports covering the plants of the Inland Steel Company and the Chicago By-Product Coke Company are substantially the same as those approved by this Court, and no contention is made that the orders accompanying such reports are not valid. The controversy here is narrow and involves the question as to whether the industries or the railroads are entitled to the funds that were impounded and withheld by the carriers under the directions of the District Court pending the final disposition of the cases.

The report in the *Inland Steel Company Case,* dated July 11, 1935 (R. 66) directed the Indiana Harbor Belt Railroad, serving that plant, to cease and desist on or before September 3, 1935, from paying any allowance to the industry because such allowances were for non-common-carrier services. A bill in equity to set aside the Commission's order was filed August 5, 1935 (R. 1) and, after hearing, an interlocutory injunction "during the pendency

of this matter" (R. 79) was granted. In that decree the court provided in part as follows:

> It is further ordered that the operation of the aforesaid tariff schedule filed by defendant, Indiana Harbor Belt Railroad Company, to become effective September 3, 1935, cancelling the aforesaid allowance to plaintiff be, and it is hereby, suspended and set aside, pending the further order of this Court.
>
> It is further ordered, that until the further order of the Court, any and all sums due and payable to plaintiff, under the aforesaid tariff providing said allowance, shall be set up by defendant Indiana Harbor Belt Railroad Company on its books of account, which sums so set up shall be paid over to plaintiff, or canceled, only upon the further [116–122] order of this Court, plaintiff by its counsel having agreed in open court to such arrangement, without prejudice. (R. 79–80.)

By Commission order of February 26, 1937, the effective date was postponed until June 15, 1937, (R. 95), despite the interlocutory injunction granted by the court in the meantime. It is appellant's claim that it is entitled to the impounded funds "at least" until June 15, 1937. (Brief, p. 27.)

The report in the *Chicago By-Product Coke Company Case* was dated May 28, 1936 (R. 118) and the order directing the carriers to discontinue the allowances was to become effective originally

on July 17, 1936 (R. 124). The effective date was postponed from time to time by the Commission, by various orders, until June 15, 1937 (R. 137). A bill in equity to enjoin this order was filed September 2, 1936, (R. 105) and an interlocutory injunction temporarily restraining the Commission's order (which at that time was to become effective on December 15, 1936, R. 131) was issued on December 2, 1936 (R. 131). In that decree the court provided:

> Now, therefore, it is ordered that during the pendency of this matter the United States of America and the Interstate Commerce Commission be and they are hereby restrained and enjoined from taking any steps for the enforcement and execution of the aforesaid report and order entered the 28th day of May, 1936, in said Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, insofar as the same apply to plaintiff, Chicago By-Product Coke Company, and the said report and order are suspended, stayed, and set aside, pending the further order of the court.
>
> It is further ordered, That until the further order of the Court, The Belt Railway Company of Chicago, Chicago & Illinois Western Railroad, and Illinois Central Railroad Company are authorized and directed to withhold payments of the allowances covered by their tariffs to the plaintiff, Chicago By-Product Coke Company. (R. 132).

In this case appellant also claims that it is entitled to the monies withheld by the carriers pursuant to the terms of the interlocutory decree.

On April 27, 1938, the lower court dissolved the interlocutory injunctions theretofore granted and ordered the dismissal of both petitions for want of equity (R. 93; 135). At the same time the court directed that the amounts set up and withheld by the carriers pursuant to the terms of the interlocutory injunctions should be retained by the railroads as a part of their general funds (R. 93; 135). It is from this action of the court that appellants appeal. Although there were six cases disposed of by the lower court in the consolidated proceeding (R. 81) involving the same issues, with the exception of the Crane Company plant, where the railroad performs the spotting service itself instead of paying an allowance to the industry as in the other cases (R. 86) appeals have been taken only in the *Inland Steel Company* and the *Chicago By-Product Coke Company Cases.*

The questions presented by the assignment of errors (R. 102; 176) in both cases, as well as in the "Statements of Points to be Relied Upon", (R. 180; 182) are the same. They may be summarized as follows: (1) The lower court erred in directing the carriers to retain the funds that were impounded under the interlocutory injunctions as a part of their general funds; (2) because, as a result of the court's action in granting the interlocutory

injunctions, the Commission's orders directing the cancellation of the allowance tariffs were enjoined, said tariffs were in full force and effect; (3) the effect of the final decree in the District Court in the two cases is to make the Commission's order effective, in the case of the Inland Steel Company on September 3, 1935, (R. 181) and in the case of the Chicago By-Product Coke Company, on December 2, 1936, (R. 183) which are the dates of the interlocutory injunctions, contrary to the terms of the orders as extended, and (4) it is contended that the decrees in authorizing and directing the carriers—defendants below—to withhold payments to appellants (which of course refer to the interlocutory decrees) were not supported by any evidence or by any findings of fact, as required by Equity Rule 70½ (R. 181; 184). This contention is made despite the fact that the District Court, in its interlocutory injunction in the *Inland Steel Company Case,* in referring to the provision requiring the maintenance of a separate account concerning the payments that would have been made under the tariffs, stated that "plaintiff by its counsel having agreed in open court to such arrangement, without prejudice" (R. 80). The language of the court in its interlocutory injunction in the *Chicago By-Product Coke Company Case* (R. 131–132) though worded somewhat differently, in substance, is the same, because the injunction was granted "upon motion of plaintiff for such inter-

locutory injunction pending final order of the court herein." (R. 131) These interlocutory injunctions, granted by the District Court at the earnest solicitation of appellants, issued on August 28, 1935, (R. 80) and on December 2, 1936, (R. 131) respectively. Appellants uttered not a word of complaint against such injunctions, granted at their request, until after final decrees in each case, on April 27, 1938, had been entered (R. 93; 135), dismissing the bills. In their motions to modify the final decrees filed May 25, 1938, for the first time they raised question as to the District Court's action in granting the interlocutory injunctions (R. 96; 139).

The lower court's final decrees were the same in both cases (R. 93; 135), and contained two provisions, (1) that the impounded sums, which had been withheld under the terms of the interlocutory injunctions, should be retained by the railroads as a part of their general funds, and (2) dismissing the petitions for want of equity and sustaining the orders of the Commission on the merits. From the standpoint of appellees, United States and Interstate Commerce Commission, the important thing of course was the sustaining of the Commission's orders and the dismissal of the petitions. From that part of the decrees, no appeals have been taken. Consequently, the Court may inquire as to the interest of the Government in that part of the decrees appealed from, namely, the lower court's action in releasing the impounded funds to the carriers

appellees. We are interested because the orders of the Commission were interlocutorily enjoined with a condition that the funds that would otherwise have been paid over to the industries, be withheld and retained separately by the railroads pending the outcome. The final decrees dissolving the injunctions and permitting the railroads to retain the impounded funds were a natural sequence of the action of the lower court in sustaining the orders. It is of interest to the Government to see that the carriers and the industries, and any one else affected by the Commission's orders, be restored to that condition, or one as close thereto as possible, that they would be in but for the erroneous granting of the interlocutory injunctions. Also, the final decrees from which these appeals are taken, though divided into parts, are a unit and, interpreted together, effect complete justice. That appellants complain of only a portion of the decrees is a matter beyond our control.

SUMMARY OF ARGUMENT

I. Confronted with a number of cases growing out of terminal allowance orders of the Commission, two of which are now before the Court, and knowing that other cases were on appeal to this Court, the District Court granted interlocutory injunctions requiring the railroads to set up on their books of accounts or to withhold, "pending the final order of the court herein", sums of money which would have been payable to appellants under the

allowance tariffs, which sums so set up or withheld were to be canceled out by the railroads or paid over to appellants only upon the further order of the court. Following the issuance of these interlocutory injunctions, the Commission issued orders postponing the effective dates of the cancellation tariffs until June 15, 1937. Our contention is that, whatever the effect of the Commission's orders as an administrative matter, when the court assumed jurisdiction of the proceedings and exercised its superior judicial power to enjoin the orders pending the outcome of the suit, Commission action was of no avail in so far as in conflict with the right of the District Court, already assumed, to dispose of the funds as the justice of the cases should require. Having caused these funds to be so segregated pending decision of the question of the validity of the orders, the court below was correct in decreeing, as it did, when it held the Commission's orders to be valid, as a part of said decrees, that the accounts should be canceled and the funds turned into the general treasuries of the respective carriers.

II. The fact that tariffs providing for the allowances were in force as a result of the interlocutory injunctions, which were dissolved upon final hearing, is not sufficient to legalize the allowances so as to require their payment to appellants. Because allowances are in tariff form affords no justification for the payment of these sums. *Merchants Ware-*

house Company v. *United States,* 283 U. S. 501, 511–512. Since common-carrier obligation to deliver or accept cars ended at the interchange tracks, the services beyond were noncommon carrier in character, for which no allowances, whether attempted to be justified in a tariff or otherwise, could legally be paid. *United States* v. *American Tin Plate Company,* 301 U. S. 402.

III. Appellants contend that the decrees of the District Court in authorizing and directing the carriers to withhold payments to appellants (which of course refers to the interlocutory decrees as these alone had the impounding provisions) were not supported by any evidence or by any findings of fact, as required by Equity Rule 70½. These interlocutory injunctions were granted in 1935 and 1936 at the earnest solicitation of appellants, and no complaint was made that the injunctions had been improvidently granted until after the final decrees in these cases had been entered, on April 27, 1938. Having sought and obtained the court's favorable action with the usual condition attached thereto, appellants are not now in a position to question that action after sitting idly by for so long a period of time. All the District Court did, in so far as these appeals are concerned, was to interpret the provisions of its own previously-issued interlocutory injunctions. It was merely the completion of jurisdiction by the court, organized to pass upon the question whether the challenged orders of the

Commission should be vacated or upheld. The District Court's jurisdiction was derived "from that primary jurisdiction and is ancillary thereto. In the exercise of that power it is not required to lend its aid in perpetuating a forbidden practice." *Atlantic Coast Line R. Co.* v. *Florida*, 295 U. S. 301, 314.

ARGUMENT

I. The disposition made of the impounded funds by the final decrees of the lower court, namely, that such monies be retained by the carriers in their general funds, is obviously correct, and the decrees should be affirmed

From past litigation, the background of these cases is somewhat familiar to this Court, but in considering the questions in issue here the following facts are material:

The Commission's report stating general principles with respect to terminal allowances, was dated May 14, 1935, (R. 14). Thereafter, within a relatively short time, the Commission issued 58 supplemental reports, the last one on August 24, 1936.[2]

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[2] These 58 reports, in order, covered the plants of the *Interlake Iron Corporation at Toledo*, 209 I. C. C. 51; the *Detroit Edison Company at Detroit*, 209 I. C. C. 55; the *Universal Atlas Cement Company at Steelton, Minn.*, 209 I. C. C. 61; the *Sheffield Steel Corporation at Kansas City*, 209 I. C. C. 64; the *Standard Oil Company of Louisiana at North Baton Rouge*, 209 I. C. C. 68; the *East Chicago Dock Terminal Company at East Chicago, Ind.*, 209 I. C. C. 73; the *Ford Motor Company at Detroit*, 209 I. C. C. 77;

Forty of these 58 supplemental reports were taken into three-judge courts,[3] 17 Commission

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the *Keystone Steel & Wire Company at Peoria*, 209 I. C. C. 82; the *Pittsburgh Steel Company at Monessen, Pa.*, 209 I. C. C. 87; the *Magnolia Petroleum Company at Chaison, Texas*, 209 I. C. C. 93; the *Allegheny Steel Company at Brackenridge, Pa.*, 209 I. C. C. 273; the *Minnesota By-Products Coke Company at St. Paul, Minn.*, 209 I. C. C. 421; the *Humble Oil & Refining Company at Baytown, Texas*, 209 I. C. C. 727; the *Timken Roller Bearing Company at Canton, Ohio*, 209 I. C. C. 441; the *Weirton Steel Company at Weirton, West Virginia*, 209 I. C. C. 445; the *Mexican Petroleum Corporation at Destrehan, La.*, 209 I. C. C. 394; the *Pittsburgh Plate Glass Company at Ford City, Pa.*, 209 I. C. C. 467; the *American Sheet & Tin Plate Company, with plants at Vandergrift and Scottdale, Pa., and Wellsville, Ohio*, 209 I. C. C. 719; the *Inland Steel Company at Indiana Harbor, Ind.*, 209 I. C. C. 747; the *Wickwire-Spencer Steel Company at Harriet, N. Y.*, 209 I. C. C. 751; the *Gulf Refining Company at Port Arthur, Texas*, 209 I. C. C. 756; the *Granite City Steel Company at Granite City and Madison, Ill.*, 209 I. C. C. 761; the *Celotex Company at Marrero, La.*, 209 I. C. C. 764; the *Texas Company at Houston, Texas*, 209 I. C. C. 767; the *Western Paving Company near Dougherty, Okla.*, 209 I. C. C. 770; *Detroit Harbor Terminals, Detroit, Mich.*, 209 I. C. C. 787; *Great Southern Lumber Company—Bogalusa Paper Company at Bogalusa, La.*, 209 I. C. C. 793; the *St. Louis Gas & Coke Corporation at Granite City, Ill.*, 209 I. C. C. 797; the *Kansas City Power & Light Company at Kansas City, Mo.*, 210 I. C. C. 103; the *Great Lakes Steel Corporation at Detroit, Mich.*, 210 I. C. C. 9; *Iron Ore Mining Companies Stock Pile Allowances, in the Mesabi Iron Range District of Minnesota*, 210 I. C. C. 254; *Studebaker Corporation at South Bend, Ind.*, 210 I. C. C. 137; the *Interlake Iron Corporation at Duluth, Minn.*, 210 I. C. C. 205; the *Crane Company at Chicago, Ill.*, 210 I. C. C. 210; the *West Leechburg Steel Company at Leechburg, Pa.*, 210 I. C. C. 213; the *Alabama By-Products Corporation at North Birmingham,*

orders reaching and being sustained by this Court (*United States* v. *American Tin Plate Company,*

Ala., 210 I. C. C. 644; the *Petoskey Portland Cement Company at Petoskey, Mich.*, 210 I. C. C. 242; the *Louisville Cement Company at Speeds, Ind.*, 210 I. C. C. 293; the *Standard Steel Car Company at Hammond, Ind.*, 210 I. C. C. 296; the *General American Tank Car Corporation at East Chicago, Ind.*, 210 I. C. C. 383; the *Pacolet Manufacturing Company at Pacolet, S. C.*, 210 I. C. C. 475; the *Marion Steam Shovel Company at Marion, Ohio*, 210 I. C. C. 655; the *Pittsburgh Plate Glass Company at Crystal City, Mo.*, 210 I. C. C. 527; the *Texas Company at Port Arthur, Texas*, 213 I. C. C. 583; the *Goodman Lumber Company at Goodman, Wis.*, 214 I. C. C. 89; the *Wheeling Steel Corporation at Benwood, West Virginia, Martins Ferry, Ohio, Steubenville, Ohio, Portsmouth, Ohio, and other points in Ohio and West Virginia*, 214 I. C. C. 53; the *John Morrell & Company at Ottumwa, Iowa*, 215 I. C. C. 431; the *Uvalde Rock Asphalt Company between Cline and Blewett, Texas*, 218 I. C. C. 271; the *Commonwealth Edison Company at Chicago, Ill.*, 215 I. C. C. 173; the *William Wharton, Jr., & Company, Inc., at Easton, Pa.*, 215 I. C. C. 623; the *Midvale Company at Nicetown, Pa.*, 215 I. C. C. 626; the *Acme Steel Company at Riverdale, Ill.*, 215 I. C. C. 373; *A. O. Smith Corporation at Milwaukee, Wis.*, 215 I. C. C. 534; the *Warren Foundry & Pipe Corporation at Phillipsburg, N. J.*, 215 I. C. C. 653; the *Staley Manufacturing Company at Decatur, Ill.*, 215 I. C. C. 656; the *Chicago By-Product Coke Company at Chicago, Ill.*, 216 I. C. C. 8; the *American Steel Foundries at Indiana Harbor, Ind.*, 216 I. C. C. 13; and the *Louisiana Development Company at Winfield, La.*, 218 I. C. C. 276.

[3] These 40 cases were brought by the Interlake Iron Company (Toledo plant) in the Northern District of Ohio; by the Elgin, Joliet & Eastern Railway Company in the Northern District of Indiana; by the Standard Oil Company of Louisiana in the Eastern District of Louisiana; by the Keystone Steel & Wire Company in the Southern District of Illinois; by the Sheffield Steel Corporation in the Western

6 orders, 301 U. S. 402; *United States* v. *Pan American Corporation,* 9 orders, 304 U. S. 156;

District of Missouri; by the American Sheet & Tin Plate Company, the Allegheny Steel Company, the Pittsburgh Plate Glass Company and the Weirton Steel Company, all in the Western District of Pennsylvania; by the Koppers Company in the District of Minnesota; by the Timken Roller Bearing Company in the Northern District of Ohio; by the Celotex Company and the Pan American Petroleum Corporation in the Eastern District of Louisiana; by the Magnolia Petroleum Company, the Gulf Refining Company, the Humble Oil Company and the Texas Corporation, all in the Southern District of Texas; by the Great Southern Lumber Company in the Eastern District of Louisiana; by the Inland Steel Company in the Northern District of Illinois; by the Kansas City Power & Light Company in the Western District of Missouri; by the Great Lakes Steel Company in the Eastern District of Michigan; by the West Leechburg Steel Company in the Western District of Pennsylvania; by the Interlake Iron Corporation (Duluth, Minn., plant) in the Northern District of Illinois; by the Wisconsin Steel Company, the Crane Company, the Acme Steel Company, the American Steel Foundries, and the Chicago By-Product Coke Corporation, all in the Northern District of Illinois; by the East Chicago Dock Terminal in the Northern District of Indiana; by the Pittsburgh Plate Glass Company (Crystal City, Mo., plant), in the Western District of Pennsylvania; by the Texas Company in the Southern District of Texas; by the Goodman Lumber Company in the Eastern District of Wisconsin; three suits by the Wheeling Steel Corporation in the Northern District of West Virginia; by the Warren Foundries Corporation in the District of New Jersey; by the Staley Company in the Southern District of Illinois; by the Louisiana Development Company in the Eastern District of Louisiana; by the A. O. Smith Corporation in the Eastern District of Wisconsin and by the Louisville Cement Company in the Western District of Kentucky. (These cases are summarized in the Commission's Forty-ninth Annual Report, pages 106–110;

Goodman Lumber Company v. *United States* and *A. O. Smith Corporation* v. *United States*, 301 U. S. 669).

With this large number of cases, requests were made of the Commission by District Judges and counsel for postponement of the orders to meet the convenience of the court or of counsel. Many of these requests were granted, and some postponement orders were entered even after the courts, exercising their superior judicial power, had granted interlocutory injunctions against the Commission's orders. Appellants' case for the impounded funds rests upon the alleged conflict between the Commission's action postponing the effective dates and the court's action in granting the preliminary injunctions. The Court will note that in every order the Commission made postponing the effective date, there was a further provision "that the said order shall in all other respects remain in full force and effect." (R. 133; 133–134; 134; R. 80). The Commission's findings made long before that the carriers were paying the industries allowances not permitted by law because not covering common-carrier services, were in no way modified, nor have such findings ever been modified.

It was natural that some of these cases should progress in the District Courts faster than others.

Fiftieth Annual Report, pages 116–121, and Fifty-first Annual Report, pages 119–126).

Among the first decided by lower courts were six cases in the Western District of Pennsylvania, reported in *American Sheet & Tin Plate Company* v. *United States,* 15 F. Supp. 711, May 23, 1936. The large number of suits brought within a relatively short time, with the statutory requirement for a court of three judges, imposed a heavy burden on Federal courts. Knowing that the six Pittsburgh cases, before referred to, were being appealed to this Court, and that the principles of law announced in such decision would have bearing on the issues before them, it was also natural for the District Courts to hold the cases in *status quo,* pending the decision of this court, especially where it was felt that the interests of the litigants could be adequately protected by the impounding of the funds or the requirement for bonds pending appeal. The result was that (besides the six Pittsburgh cases where interlocutory injunctions were also granted), the District Courts, in 27 cases which were heard on applications for interlocutory injunctions, granted the injunctions in 24 cases [4] and de-

[4] Besides the six Pittsburgh cases, the 24 cases in which preliminary injunctions were granted by three-judge courts and dates of the granting of such injunctions were:

Elgin, Joliet & Eastern Case, Northern District of Indiana, October 10, 1935; Standard Oil Company of Louisiana, Eastern District of Louisiana, July 12, 1935; Keystone Steel & Wire Company, Southern District of Illinois, August 13, 1935; Sheffield Steel Corporation, Western District of Missouri, September 7, 1935; The Celotex Company, Pan American Petroleum Corporation, The

nied them in only three.[5] In the 24 cases in which preliminary injunctions were granted, withholding

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Magnolia Petroleum Corporation, The Gulf Refining Terminal Company, Humble Oil & Refining Company, The Texas Company, the Great Southern Lumber Company (consolidated) by the District Court for the Eastern District of Louisiana and the Southern District of Texas on August 19, 1935; Inland Steel Company Case, by the U. S. District Court for the Northern District of Illinois on August 28, 1935; Kansas City Power & Light Company Case, U. S. District Court for the Western District of Missouri on September 4, 1935; Great Lakes Steel Corporation Case, Eastern District of Michigan on August 31, 1935; Interlake Iron (Duluth Plant) Case, U. S. District Court, Northern District of Illinois, on September 13, 1935; East Chicago Dock Case, by the U. S. District Court, Northern District of Indiana, on October 10, 1935; Crane Company Case, by the U. S. District Court for the Northern District of Illinois, on November 25, 1935; Goodman Lumber Company Case, by the U. S. District Court for the Eastern District of Wisconsin, on April 28, 1936; in three cases brought by the Wheeling Steel Corporation, in the U. S. District Court for the Northern District of West Virginia, preliminary injunctions were granted on March 19, 1936; in cases involving the Acme Steel Company, American Steel Foundries and the Chicago By-Product Coke Company, interlocutory injunctions were granted in these three cases on December 2, 1936, by the U. S. District Court for the Northern District of Illinois.

[5] The three cases in which interlocutory injunctions were denied were: *Koppers Company* v. *United States*, involving the Commission's order in *Minnesota By-Product Coke Company*, 209 I. C. C. 421, by the U. S. District Court for the District of Minnesota, 11 F. Supp. 467; in the *Timken Roller Bearing Case*, preliminary injunction was denied on August 20, 1935; by the U. S. District Court for the Northern District of Ohio, and on November 30, 1936, the U. S. District Court for the Eastern Ditsrict of Louisiana denied a preliminary injunction in the case growing out of the Commission's report in the *Louisiana Development Company Case*, 218 I. C. C. 276. See 18 F. Supp. 629.

and impounding of the funds by the carriers, or the giving of bonds by the industries, were required as conditions to the issuance of the injunctions in 23 cases,[6] while no such requirement was made in but one case.[7]

With these general statements and background, we approach the facts in the two appeals before the Court, again directing your attention to the fact that while there were six cases in the lower court, (R. 81–92) all upon practically the same footing,

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[6] These cases were the Elgin, Joliet & Eastern Case, Northern District of Indiana; Standard Oil Company of Louisiana Case, Eastern District of Louisiana; Keystone Steel & Wire Case, Southern District of Illinois; Sheffield Steel Corporation Case, Western District of Missouri; Celotex Company Case and Pan American Petroleum Corporation Case, Eastern District of Louisiana; Magnolia Petroleum Case, Gulf Refining Terminal Case, Humble Oil & Refining Company Case, and the Texas Company Case, all in the Southern District of Texas; Great Southern Lumber Company Case, Eastern District of Louisiana; Inland Steel Company Case, Northern District of Illinois; Kansas City Power & Light Company Case, Western District of Missouri; Great Lakes Steel Corporation Case, Eastern District of Michigan; Interlake Iron Corporation Case (Duluth plant), Northern District of Illinois; Crane Company Case, Northern District of Illinois; Goodman Lumber Company Case, Eastern District of Wisconsin; three Wheeling Steel Corporation Cases, Northern District of West Virginia; Acme Steel Company Case, American Steel Foundries Company Case, and Chicago By-Product Coke Company Case, all in the U. S. District Court for the Northern District of Illinois.

[7] The one case in which no bond or impounding provision was required upon the granting of the interlocutory injunction was the East Chicago Dock Terminal Company Case, U. S. District Court for the Northern District of Indiana.

appeals in but two cases have been taken. (R. 101; 175).

Inland Steel Case: The Commission's report and order in this case issued July 11, 1935, (R. 66) and the allowances by the Indiana Harbor Belt to the industry were to be discontinued "on or before September 3, 1935". (R. 71) Petitioner filed its petition in equity to set aside the Commission's order on August 5, 1935 (R. 1) and the Court's interlocutory injunction—made upon motion of plaintiff—"pending the final order of the court herein" (R. 78) was granted August 28, 1935 (R. 78). By this injunction the sums payable to appellant under the allowance tariff, were to be set up by the railroad "on its books of account, which sums so set up shall be paid over to plaintiff, or canceled, only upon the further order of this Court, plaintiff by its counsel having agreed in open court to such arrangement, without prejudice." (R. 80)

Before the suit was filed, petitioner importuned the Commission (on July 19, 1935) to vacate its prior order or to postpone the effective date thereof, which request was denied by the Commission on July 26, 1935. (R. 4.) Then this suit was brought. (R. 1.)

In the meantime the carrier serving the plant, the Indiana Harbor Belt Railroad, issued a cancellation notice in a tariff (R. 99), pursuant to the terms of the Commission's order, that on and after September 3, 1935, it would no longer pay the al-

lowance. After the interlocutory injunction was issued (on August 28, 1935), this carrier filed a cancellation supplement, suspending until further notice its cancellation of the allowance tariff, upon the authority of the interlocutory injunction (R. 100).

These facts demonstrate clearly that, up to the time the Court assumed jurisdiction, there was no overlapping of orders of the Commission with the Court's order issuing a preliminary injunction. So far as this record shows, it was not until February 26, 1937, that the Commission—"good cause appearing therefor"—(R. 95; 133) postponed the effective date of its order to June 15, 1937, the order in all other respects to remain in full force and effect (R. 96; 133). Certain it is that when the suit was filed (R. 1) and when the injunction issued (R. 78) the Commission had expressly refused to postpone the order, which was to be effective September 3, 1935. This is in fact shown in the petition (R. 4).

Regardless of technicalities it is our position that on and after the court exercised its superior judicial authority on August 28, 1935, (R. 78) in granting the interlocutory injunction, inferior administrative action by the Commission, whatever other effect it might have, was of no avail in so far as in conflict with the right of the District Court, under the terms of the interlocutory injunction running "during the pendency of this matter",

(R. 79) to dispose of the funds withheld by its order.

Chicago By-Products Case: The facts in this case are a little different, although governed by the same legal principles. The Commission's Fifty-sixth Supplemental Report, covering this plant, was issued May 28, 1936, (R. 118) to become effective July 17, 1936 (R. 124). On June 30, 1936, pursuant to motion filed by appellant, (R. 134) the effective date of the order was postponed to October 15, 1936, (R. 134) and another postponement, pursuant to a similar motion, (R. 133) until December 15, 1936, (R. 133–134) was granted. By both postponement orders, provision was made that, in other particulars the order "shall in all other respects remain in full force and effect". (R. 133–134; R. 134.) The petition was filed on September 2, 1936, (R. 105) reference made therein to the order of postponement until October 15, 1936, (R. 109) and an interlocutory injunction and other relief prayed. (R. 117–118.) The District Court assembled and on December 2, 1936, (R. 131) issued an interlocutory injunction restraining the Commission's order, which at that time was to become effective on December 15, 1936. (R. 131.) By this injunction the sums payable to appellant under the allowance tariff, were to be withheld by the respective carriers "until the further order of the court". (R. 132.) Both post-

ponements it will be recalled, were made on motion of appellants. (R. 133; R. 134.)

In the meantime the carriers involved in this case issued cancellation notices in their tariffs (R. 142; 160–161) providing that, under the Commission's order, on and after July 17, 1936, they would no longer pay the allowances provided for in the tariffs. These cancellation supplements were postponed from time to time as a result of the Commission's postponement orders (R. 143; 144; 145; 164; 165) and finally, the carriers concerned filed notices that, because of the interlocutory injunction granted on December 2, 1936, the tariffs cancelling the allowances would be withdrawn (R. 145; 166).

It is thus shown that on December 2, 1936, the court granted an interlocutory injunction, with the withholding of payments provision (R. 132) to restrain the order then to become effective December 15, 1936 (R. 131). No action was taken by the Commission between its order of September 10, 1936, (R. 133) effective December 15, 1936 (R. 134) and its subsequent order of February 26, 1937, effective June 15, 1937 (R. 80).

It is our position here, too, that regardless of technicalities, the matter that is of legal significance is that, on December 2, 1936, the Court restrained the operation of the Commission's order as amended, then effective December 15, 1936, (R. 131) "during the pendency of this matter" (R. 132) and that thereafter any order of the Commission purporting to extend the effective date of the

order again, could have no effect upon the right of the District Court to order disposition of the impounded funds. (R. 132.) We submit that after the entry of the interlocutory injunctions neither the Commission, the carriers nor the appellants could legally change the situation required by the court to be maintained.

Under the terms of the interlocutory injunctions the respective carriers have set up on their books and now hold large sums of money which, but for such injunctions, would have remained in their general funds. Having caused these funds to be so segregated, it is obvious that, since the Commission's order is now admittedly valid, the court below should, as it did, decree that said accounts should be canceled and the funds turned into the general treasuries of the respective carriers. (R. 93; 135.) The District Court retained jurisdiction to put the carriers in the same position they would have occupied except for the erroneous granting of the interlocutory injunctions.

That the matter was a discretionary one is not only well-established by your decisions (*Alabama* v. *United States*, 279 U. S. 229) but also from the jurisdictional statute itself.

U. S. Code, Title 28, Section 46, provides:

> Suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission shall be brought in the District Court against the United States. The pendency of such suit shall not of itself stay

> or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the Commission's order pending the final hearing and determination of the suit.

Section 15 (2) of the Interstate Commerce Act provides that

> Except as otherwise provided in this part, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than 30 days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

This provision indicates, what seems to us apparent, that when the court annuls an order of the Commission "during the pendency of this matter" (R. 79; 132) orders of the Commission in conflict therewith, in so far as judicial proceedings are concerned, are superseded.

In the cases at bar, in order to have decrees requiring the segregated allowances to be paid over to them, appellants must make out that a fixed and certain duty has been laid upon the court to make the carriers pay the price of a subsequently-determined mistake of the court in issuing its interlocutory injunctions. Clearly, the court is under no such duty. On the contrary, under the doctrine

of *Atlantic Coast Line R. Co.* v. *Florida,* 295 U. S. 301, the lower court was right in going to the full extent of its powers in order to give the defendant carriers every advantage and benefit, which but for the interlocutory injunctions they would have enjoyed under the orders of the Commission.

As said by District Judge Tuttle, delivering an oral opinion of the Court in *Great Lakes Steel Corporation* v. *United States,* U. S. District Court, Eastern District of Michigan, In Equity No. 7182, wherein the court had directed an impoundment of funds, after referring to this Court's decisions in the *American Sheet & Tin Plate Case* and in the *Pan American Petroleum Case, supra:*

> If we had had the benefit of these decisions by the Supreme Court at the time we entered that temporary order it, of course, would not have been entered as it was entered.

In a number of other cases three judge courts have reached the same conclusion. Such cases include:

> *Wheeling Steel Corporation* v. *United States,* In Equity Nos. 1011, 1012, 1013 (three cases)—U. S. District Court for the Northern District of West Virginia—Final decrees entered May 12, 1938.
>
> *Keystone Steel & Wire Company* v. *United States,* In Equity No. 1309—U. S. District Court for the Southern District of Illinois, Northern Division—Final decree entered June 25, 1938.

Interlake Iron Corporation v. *United States,* In Equity No. 14777; *Acme Steel Company* v. *United States,* In Equity No. 15240; *American Steel Foundries* v. *United States,* In Equity No. 15309—United States District Court for the Northern District of Illinois, Eastern Division—Final decrees entered April 27, 1938.

In these seven cases the time within which appeals might have been taken has expired.

Our contention is that the disposition of the impounded funds is dependent upon the final outcome of the suits. If the suits were not well grounded in the first place, as is now conceded, the restrictions upon the funds were properly removed upon the dissolution of the temporary injunctions and the final decrees dismissing the cases.

Appellants suggest that because certain other shippers have been receiving allowances during the progress of other cases, the court should award the accumulated funds to them to prevent discrimination. It is true that in the *Pittsburgh cases,* the lower court, in granting the interlocutory injunctions, did not require the impounding of the allowances during the litigation, or require a bond, as District Courts in other cases did. The failure or refusal of another court to make adequate provision for adjustment of rights at the end of the litigation is no ground for reading out of the lower court's injunctions here the provisions it did have the foresight to include. It has already been pointed out that various District Courts handled

these cases in different ways (pp. 20–22). That some shippers received allowances while the cases were going through the courts is immaterial to the issues here. We have shown that other courts have finally decreed that the carriers retain the impounded funds. Under these facts, would not appellants' success here result in the discrimination they seek to avoid? No question of discrimination between industries was before the Commission or dealt with by it. Also there is authority for urging that the carriers who, pursuant to the erroneous interlocutory decrees of those courts, continued to pay the allowances may obtain judgment for restitution. (*Baltimore & Ohio R. Co.* v. *United States,* 279 U. S. 781).

Some disposition of these funds was clearly necessary for a proper disposition of the cases, and was required of the District Court even if its attention had not been directed to it, contrary to the fact.

Essentially the question of interpreting its injunctions was one for the lower court, but it is clear that, when granting the injunctions, the court could readily see that no injury would ensue if the injunctions should be dissolved on final hearing as erroneously granted. It is unnecessary to go beyond this Court's decision in the *Tin Plate Case,* 301 U. S. 402, 408, to show the lack of substance to appellants' claim, for as the Court said:

> * * * Since the Commission finds that the carriers' service of transportation is com-

> plete upon delivery to the industries' interchange tracks and that spotting within the plant is not included in the service for which the line haul rates are fixed, there is power to enjoin the performance of that additional service or the making of an allowance to the industry which performs it.

With transportation service ending on the interchange tracks, it was not the duty of the carrier to make payments for services performed beyond those tracks, because not a part of its common carrier obligation.

In *Baltimore & Ohio R. R. Co.* v. *United States,* 279 U. S. 781, the appellant and other railroads operating between the Mississippi River and the Atlantic Coast were required by the Commission's order to pay certain costs of transferring through freight from the east to the west side of the Mississippi River at St. Louis. They brought suit to set aside the Commission's order and the lower court dismissed the suit. Upon appeal, however, this Court held that the Commission's order was invalid and reversed and remanded the case to the lower court for action consistent with its opinion. The lower court complied with the mandate in so far as it required the setting aside of dismissal and the entry of a decree annulling the Commission's order. It, however, denied an application made by the appellant for the ascertainment of the amount of payments which had been made by it in compliance with the Commission's order afterwards found to be illegal. Upon the second appeal this

Court again reversed the lower court and directed the ascertainment of, and a judgment for, the amount of charges paid by the appellants. Answering the contention of the appellees that the three-judge court, and consequently this Court on appeal, lacked jurisdiction over the matter of the repayment of the charges collected from the appellants, you said (pp. 785–786):

> Applicants' application for restitution was in effect an equity proceeding resulting in a final decree. *Perkins* v. *Fourniquet*, 14 How. 328, 330. When a lower federal court refuses to give effect to or misconstrues our mandate, its action may be controlled by this court, either upon a new appeal or by writ of mandamus. *In re Potts*, 166 U. S. 263, 265. *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 255, and cases cited. It is well understood that this court has power to do all that is necessary to give effect to its judgments. The Act authorizes this appeal.
>
> Moreover the proceeding below out of which the denial of restitution arose is incidental to and in effect a part of the main suit. Under the Act a court of three judges was required for the entry of the decree on the mandate. *Ex parte United States*, *supra*, 424. *Ex Parte Metropolitan Water Co.*, 220 U. S. 539, 544. The jurisdiction of the court so constituted necessarily includes power to make all orders required to carry on such suits and to enforce the rights and obligations of the parties that arise in the litigation. This appeal rests on the same

foundation as did the first. *Arkadelphia Co.* v. *St. Louis S. W. Ry.*, 249 U. S. 134, 142.

The east side roads are entitled to restitution. The order should have been set aside in the first instance. As a result of the erroneous refusal of the court, the burden of the transfer charges in question was shifted from the west side roads to the east side roads and was by them borne until the order was set aside on the reversal of the decree dismissing the bill. All payments made by appellants in compliance with the invalid order enured to the benefit of the west side roads just as if made directly to them.

The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established. And, while the subject of the controversy and the parties are before the court, it has jurisdiction to enforce restitution and so far as possible to correct what has been wrongfully done. *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216, 219. *Arkadelphia Co.* v. *St. Louis S. W. Ry Co., supra*, 145. *Ex parte Lincoln Gas Co.*, 256 U. S. 512, 516. When the erroneous decree was reversed and the invalid order was set aside, the law raised an obligation against each of the west side roads to make restitution of the payments made by the east side roads in compliance with the order. And thereupon each of the east side roads became entitled to have the amounts so paid by it together with interest thereon from the dates of such payments at the rate established by the law of the State in which such sums were paid.

In *Atlantic Coast Line R. Co.* v. *Florida*, 295 U. S. 301, there was involved a question of restitution upon facts succinctly stated by this Court in its opinion (p. 305) as follows:

> Freight charges were collected by a railroad carrier in accordance with an order of the Interstate Commerce Commission after the refusal of a United States District Court to declare the order void. Later the decree was reversed by this court without considering the evidence on the ground that the findings of the Commission were incomplete and inadequate. *Florida* v. *United States*, 282 U. S. 194. Still later the Commission upon new evidence and new findings made the same order it had made before, this court confirming its action after appropriate proceedings. *Florida* v. *United States*, 292 U. S. 1. The question now is whether restitution is owing from the carrier for the whole or any part of the rates collected from its customers while the first order was in force. * * *.

The decision contains this holding (p. 309):

> * * * The claimant to prevail must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it. * * *.

At page 312, you said:

> * * * If the processes of the law had been instantaneous or adequate, the attempt at correction would not have missed the mark. * * *.

In that case the test prescribed by the Court was thus stated:

> * * * To prevail, the claimants must make out that in the circumstances here developed a fixed and certain duty has been laid upon a court of equity to make the carrier pay the price of the blunders of the commerce board in drawing up its findings. * * *. (Id. 314)

The circumstances and legal principles involved make it clear that the District Court's decrees releasing the impounded funds to the railroads should be affirmed.

II. The fact that tariffs providing for the allowances were in force as a result of the District Court's granting of erroneous interlocutory injunctions, is not sufficient to legalize the allowances so that their payment to appellants is required

It is appellants' position that the allowances condemned by the Commission are legally due and payable so long as the tariffs providing for them remain on file with the Commission. This same contention was made in the *American Tin Plate Company case, supra.* At page 408 of that opinion this Court said:

> * * * Since the Commission finds that the carriers' service of transportation is complete upon delivery to the industries' interchange tracks, and that spotting within the plants is not included in the service for which the line-haul rates were fixed, there is

> power to enjoin the performance of that additional service or the making of an allowance to the industry which performs it.

It is a late day to urge that because allowances are in tariff form, this fact justifies or requires the payment of these sums. In *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, it was said (pp. 511–512):

> Where a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form, cannot clothe it with immunity. See *Louisville & Nashville R. Co.* v. *Interstate Commerce Comm.,* 282 U. S. 740. In that case we held that a carrier may not haul private cars of some of its passengers free of charge and deny the privilege to others on the theory that it is using the cars which it carries free, as instrumentalities of transportation. The very selection of the cars of some passengers and not others for the favored treatment was held to be a forbidden discrimination. The order of the Commission upheld there would be futile if discrimination could still be effected by filing an exception to the carrier's tariffs for hauling private cars, designating some private cars as transportation facilities, and then granting allowances to the owners for their use. That, in substance and practical operation, is the effect of the tariff exceptions and the allowances which the present order forbids.

(See also *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 225 U. S. 326, 345; *Chicago & Alton Ry. Co.* v. *United States*, 156 Fed. 558, 560; *Central Railroad Company of New Jersey* v. *United States*, 229 Fed. 501, 507–509; *Gallagher* v. *Pennsylvania R. Co.*, 160 I. C. C. 563, 568)

Regardless of publication in tariffs, allowances are "lawful" only when supported by a consideration. To pay shippers for doing their own work is a "mere gratuity". *Mitchell Coal Company* v. *Pennsylvania R. Co.*, 230 U. S. 247.

The Commission issued definite orders pursuant to its supplemental reports, (R. 70; 124) and it cannot be inferred that the Commission did not intend its findings to be effective immediately. In no subsequent order dealing with the postponement of the effective dates (R. 80; 133; 133–134; 134) has the Commission in any way modified its findings that the allowances were illegal because covering services not common carrier in character.

Appellants also urge that the accrued funds are due and owing to them by virtue of allowance tariffs voluntarily published and on file with the Commission by the various carrier defendants herein. The original allowance tariffs may be said to have been voluntarily published. The Commission's orders, admitted to be valid, required the carriers to cease and desist from paying the allowances prescribed in those tariffs. The carriers had taken steps to cancel the original allowance tariffs pursuant to

the Commission's orders (R. 99; 142). They were suspended by court decrees, (R. 100; 144) ultimately determined to have been erroneous (R. 93; 135). To justify a court in requiring the provisions of a tariff to be adhered to, the tariff must be a legal one, it must not effect an illegal result, and it must not prescribe what the Commission has found to be an unreasonable, preferential or otherwise unlawful rate or practice. Under the circumstances appellants cannot contend that these original allowance tariffs confer upon appellants any rights to the impounded funds since the essence of the Commission's ruling was that the payments of the allowances to the various industries were illegal and such payments should be stopped.

It is likewise clear that the tariffs filed by the carriers subsequent to the issuance of the interlocutory injunctions cannot be considered either as a voluntary assumption of obligation by the carriers or as an act imposing upon the court any duty of awarding the accrued funds to the appellants. In order to harmonize their tariffs with the injunctions, the carriers filed supplements to their cancellation tariffs suspending the latter and showing that such action was in compliance with the order of the court (R. 100; 145; 166). Under such circumstances the action of the carriers, pursuant to order of the court, cannot be held to be voluntary or to have raised any contractual obligations upon them.

III. The findings of the Commission and of the Court were, under the circumstances, adequate. The interlocutory injunctions were granted at appellants' request, and it is too late now to question the conditions attached to those injunctions

The Commission made findings in each of these cases (R. 70; 123) identical with those found sufficient by this Court in the *American Tin Plate* and *Pan American Petroleum Corporation Cases, supra.* The lower court, on final hearing, rendered an opinion, discussing the facts at each of appellants' plants (R. 81; 88) applying the law (R. 90–92) and directing the dismissal of the bills "for want of equity." (R. 92.) The opinion concludes: "The foregoing includes and is adopted by us as our findings of fact and conclusions of law." (R. 92.) We don't understand those findings are questioned. But appellants contend that the decrees in authorizing and directing the carriers—defendants below—to withhold payments to appellants (referring of course to the interlocutory decrees, which alone had the impounding provisions) were not supported by any evidence or by any findings of fact, as required by Equity Rule 70½ (R. 181; 184). This contention is made despite the fact that the court in its interlocutory injunction in the *Inland Steel Company Case,* stated that "plaintiff by its counsel having agreed in open court to such arrangement, without prejudice" (R. 80), referring to the separate maintenance of

accounts and withholding of the monies. The language in the interlocutory injunction in the *Chicago By-Product Coke Company Case* (R. 131–132) though worded somewhat differently, in substance, is the same, because, as stated by the court, the injunction was granted "upon motion of plaintiff for such interlocutory injunction pending the final order of the court herein." (R. 131.) These interlocutory injunctions were granted by the District Court at the earnest solicitation of appellants on August 28, 1935, (R. 80) in the one case and on December 2, 1936, (R. 132) in the other, with not a word of complaint against such injunctions until after final decrees in each case, on April 27, 1938, had been entered (R. 93; 135), dismissing the bills. In their motions to modify the final decrees filed May 25, 1938, appellants raised for the first time the question as to the adequacy of the findings of the District Court in granting the interlocutory injunctions (R. 96; 139). Under the circumstances, appellants' position in attacking the interlocutory injunctions is a difficult one. The statute permits an appeal from an order granting or denying an interlocutory injunction, but such appeal must be taken within 30 days (38 Stat. L. 220).

Further, this Court's Equity Rule 70½, dated November 25, 1935, requiring findings of fact in cases involving interlocutory injunctions was not in effect at the time of the lower court's injunction in the *Inland Steel Company Case,* August 28, 1935 (R. 78), although it was effective when the in-

junction in the *Chicago By-Product Coke Company Case,* dated December 2, 1936 (R. 131), was granted.

Irrespective of this, however, we submit that findings are not required in a case of this kind where all the District Court is asked to do is to interpret the provisions of its own previously-issued interlocutory injunctions. This is merely the completion by the court of the jurisdiction assumed by it, at the solicitation of appellants.

As said by this Court in *Atlantic Coast Line* v. *Florida, supra,* at p. 314:

> * * * This District Court whose decree we are reviewing was organized to pass upon the question whether the challenged order of the Commission should be vacated or upheld. 28 U. S. C. § 47. Whatever power it has to compel restitution by the carrier of items subsequently collected derives from that primary jurisdiction and is ancillary thereto. In the exercise of that power it is not required to lend its aid in perpetuating a forbidden practice. * * *.

Having invoked the court's authority to issue such injunctions, and having silently agreed to the provisions thereof over a long period of time, without objection, viz., until after the final decrees of April 27, 1938, appellants could not question the sufficiency of the findings for the first time, as they attempted to do, in their motions to modify the final decrees, filed May 25, 1938. (R. 94; 136).

CONCLUSION

It is inconceivable that this Court would sanction an award to losing litigants of funds accumulated following the subject matter of the controversy. Such action would amount to a reward for bringing and prosecuting suits not well founded and would be contrary to principles and practices in equity courts.

We conclude with your language in *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134, 145–146:

> * * * Where plaintiff had judgment and execution and defendant afterwards sued out a writ of error, it was regularly a part of a judgment of reversal that the plaintiff in error "be restored to all things which he hath lost by occasion of the said judgment"; and thereupon, in a plain case. a writ of restitution issued at once; but if a question of fact was in doubt, a writ of *scire facias* was first issued. * * *. The doctrine has been most fully recognized in the decisions of this court. * * *.
>
> That a course of action so clearly consistent with the principles of equity is one proper to be adopted in an equitable proceeding goes without saying. It is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject-matter and of the parties, to correct that which has been wrongfully done by virtue of its process. *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216, 219; *Johnston & Bowers*, 69 N. J. L. 544, 547.

The decrees of the District Court should be affirmed in their entirety.

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DECEMBER 1938.

APPENDIX

Pertinent provisions of the Interstate Commerce Act are:

Section 1, subdivision 3, provides:

> (3) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit,

ventilation, refrigeration or icing, storage, and handling of property transported.

Section 6, subdivisions 1 and 7, reads:

SEC. 6. [*Amended March 2, 1889, June 29, 1906, June 18, 1910, August 24, 1912, August 29, 1916, February 28, 1920, and August 9, 1935.*] [*U. S. Code, title 49, sec. 6.*]

(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee.

Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers of freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

(7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Section 12 (1) of the Act provides:

SEC. 12. [*As amended March 2, 1889, February 10, 1891, February 28, 1920, and August 9, 1935.*] [*U. S. Code, title 49, sec. 12.*] (1) That the Commission hereby created shall have authority to inquire into

the management of the business of all common carriers subject to the provisions of this part, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this part; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this part and for the punishment of all violations thereof, and the cost and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this part the Commission shall have power to require by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

The provisions of Section 13, subdivisions 1 and 2 are:

SEC. 13. [*As amended June 18, 1910, February 28, 1920, and August 9, 1935.*] [*U. S. Code, title 49, sec. 13.*] (1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organiza-

tion, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(2) Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this part, or concerning

which any question may arise under any of the provisions of this part, or relating to the enforcement of any of the provisions of this part. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this part, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Section 15, subdivisions 1, 2, 13, and 14, read as follows:

SEC. 15. [*As amended June 29, 1906, June 18, 1910, February 28, 1920, March 4, 1927, June 19, 1934, and August 9, 1935.*] [*U. S. Code, title 49, sec. 15.*] (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or

unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(2) Except as otherwise provided in this part, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

(13) If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

(14) The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this part.

Section 46, Title 48, U. S. Code, reads as follows:

[*Judicial Code, section 208.*] Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the Commission's order pending the final hearing and determination of the suit. (June 18, 1910, c. 309, sec. 3, 36 Stat. L. 542; Mar. 3, 1911, c. 231, sec. 208, 36 Stat. L. 1149; Oct. 22, 1913, c. 32, 38 Stat. L. 219.)

U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES.

Nos. 227, 228.—October Term, 1938.

227 — Inland Steel Company, Appellant, *vs.* The United States of America, Interstate Commerce Commission and Indiana Harbor Belt Railroad Company.

228 — Chicago By-Product Coke Company, Appellant, *vs.* The United States of America, Interstate Commerce Commission, The Belt Railway Company of Chicago, et al.

Appeals from the District Court of the United States for the Northern District of Illinois.

[January 30, 1939.]

Mr. Justice Black delivered the opinion of the Court.

In No. 227, after full hearings the Interstate Commerce Commission, on July 11, 1935, found and reported[1] that the Indiana Harbor Belt Railroad was engaged in the practice of paying an allowance for appellant's service in spotting cars in appellant's plant;[2] that appellant was performing this plant service for its own convenience; that the Railroad was under no legal obligation to spot the cars and therefore the allowance was paid for service for which the Railroad was not compensated under line-haul rates; that the allowance was unlawful and afforded appellant a preferential service, not accorded to shippers generally, amounting to refund or remission of part of the rates charged or collected as compensation for transporting freight. On the same date, an order of the Commission incorporated its report and findings, including the finding that "by the payment of said allowances the Indiana Belt Railroad Company violates the Interstate Commerce Act." This order also directed the Railroad to "cease and desist on or

[1] 209 I. C. C. 747; 216 I. C. C. 8 (No. 228).

[2] "Spotting" involves handling of cars between the point of interchange between the Railroad and appellant and the points at which such cars are unloaded or loaded in appellant's plant.

before September 3, 1935, and thereafter to abstain from such unlawful practice."

August 28, 1935, upon petition of appellant, the District Court, three judges sitting, granted an interlocutory injunction by which the Commission's report and order were "suspended, stayed, and set aside"—"pending the further order of the court"; the Commission was restrained and enjoined from enforcing them; and, the Railroad having previously given public notice that its published tariff providing for the allowance would be cancelled as of September 3, 1935, in accordance with the Commission's order, the injunction suspended the effective date of the cancellation. But the interlocutory injunction also provided "that until the further order of the Court, any and all sums due and payable to plaintiff [appellant], under the . . . tariff providing said allowance, shall be set up by defendant Indiana Harbor Belt Railroad Company on its books of account, which sums so set up shall be paid over to . . . [appellant], or canceled, only upon the further order of this Court, [appellant] . . . by its counsel having agreed in open court to such arrangement, without prejudice."

February 26, 1937, the Commission entered an order purporting to extend the effective date of its command to "cease and desist" to June 15, 1937, but specifically provided that its order of July 11, 1935, should "in all other respects remain in full force and effect."

April 27, 1938, the District Court dismissed appellant's petition for want of equity, dissolved the interlocutory injunction, and ordered the accrued allowances that had been set aside in a special account by the Railroad as required by the interlocutory injunction to "be retained by . . . [the Railroad] as a part of its general funds and said account canceled."

Appellant concedes the correctness of the District Court's decree holding the Commission's order valid, dismissing the petition and denying a permanent injunction.[3] The appeal only seeks a review of the Court's action in ordering that the unlawful allowances accumulated after the date of the interlocutory injunction be retained by the Railroad and not paid to appellant.

First. In granting the interlocutory injunction, the District Court proceeded under a jurisdictional Act which provides that

[3] See. United States v. American Sheet & Tin Plate Co., 301 U. S. 402; Pan-American Petroleum Corp. v. United States of America, et al., 304 U. S. 156.

" . . . the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit."[4] Appellant invoked the Court's equity powers.[5]

A Court of Equity "in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for. It is a power inherent in the court, as a court of equity, and has been exercised from time immemorial."[6]

In the exercise of its discretion, the District Court imposed conditions in its decree granting appellant's petition for an interlocutory injunction. Appellant neither objected to the conditions nor sought review of the Court's action in imposing them, but under the interlocutory injunction enjoyed for three years the suspension—which it had sought—of the Commission's order, pending litigation. Now, the litigation ended, appellant insists that the District Court lacked jurisdiction to do more than vacate its interlocutory injunction and dismiss the petition, since no pleadings of the Railroad or the Commission sought the creation of the special allowance account. But this overlooks the governing principle that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interests the injunction may affect.[7] And the Commission, in defending its report and order, acted under its statutory duty as the representative of the interest which the public, as well as the railroads, have in the maintenance of fair, reasonable and nondiscriminatory transportation practices.[8] Moreover, in intervening the Commission prayed that it have "the benefit of such . . . decrees or relief as may be just and proper."

The Interstate Commerce Commission has primary jurisdiction to determine whether the granting of allowances for services per-

[4] 28 U. S. C. 46.

[5] Cf., Ford Motor Co. v. National Labor Relations Board, — U. S. —.

[6] Russell v. Farley, 105 U. S. 433, 438, Meyers v. Block, 120 U. S. 206, 214.

[7] Central Kentucky Co. v. Comm'n., 290 U. S 264, 271.

[8] Arkadelphia Co. v. St. Louis S. W. Railway Co., 249 U. S. 134, 146; Smith v. Interstate Com. Comm., 245 U. S. 33, 42, 43, 45; cf., Ex parte Lincoln Gas Co., 256 U. S. 512, 517; 49 U. S. C. §§ 15a, 43.

formed by shippers constitutes a discriminatory practice.[9] Here, in the exercise of its primary jurisdiction, the Commission considered the technical questions involved and made findings that the Railroad's practice was unlawfully preferential and discriminatory. In doing so, the Commission was acting in the interest of shippers generally and in behalf of the public and the national railroad system. The District Court, at the behest of this appellant, restrained the enforcement of the Commission's report and order embodying these findings. While thus acting in the interest of a single shipper, the Court properly took steps to protect the other interests—represented by the Commission—from injuries that the injunction might cause. It did so by ordering the payments, which the Commission had found unlawful, to be continued—on condition that they be segregated or paid into a separate account, pending the Court's review of the Commission's finding of illegality. This segregated account thus accrued as a result of judicial restraint of administrative proceedings in which the payments had been declared unlawful. When the Court finally determined that the administrative findings and order were correct, appellant could claim an interest in the fund only by asserting a right to payments forbidden by law, and it became the duty of the Court promptly to allocate the fund to its lawful owner.

An Equity Court having lawful control of a fund, in which there may be interests represented only by a duly authorized governmental agency, has the power and is charged with the duty of protecting those interests in disposing of the fund.[10] Otherwise, rights (such as the right of this Railroad to restitution) might be impaired or cut off while an interlocutory injunction is in effect, as for instance by statutes of limitation. Here, the Court had the power and it was its duty so to fashion its equitable decree that appellant should not be the beneficiary of unlawful payments, and to prevent the dissipation of the Railroad's assets through unlawful preferences.

Second. Appellant further insists that the Court had no power to impose the particular conditions here, because the Railroad was ordered to retain (in a special account) allowances provided for in its published tariff. This contention rests on the statutory require-

[9] Mitchell Coal & Coke Co. *v.* Penn. R. R. Co., 230 U. S. 247; St. Louis Etc. Ry. *v.* Brownsville Dist., 304 U. S. 295; Texas & Pac. Ry. *v.* Abilene Cotton Oil Co., 204 U. S. 426.

[10] Central Kentucky Co. *v.* Comm'n., *supra.*

ment that published tariffs must be observed.[11] However, before the Court acted, the Commission had found and reported—and had incorporated its findings and report in an order—that these allowances provided in the published tariff were unlawful preferences violating the Interstate Commerce Act. The Commission had also ordered that payment of the unlawful allowances cease, and the Railroad had already—in obedience to the Commission's order—published a new tariff eliminating the allowance provision. But, six days before the new tariff would by its terms have become effective, appellant sought and obtained the preliminary injunction which did not destroy, but tentatively suspended the Commission's report and order and also tentatively suspended the Railroad's tariff canceling the unlawful allowance. The Railroad then republished the old tariff, thus—under court order—restoring the unlawful allowance. When the Court subsequently dismissed appellant's petition and vacated the interlocutory injunction "in all respects", it thereby found the Commission's report and order valid and they were then in effect as though the injunction had never been granted. Thus, during the period the injunction was pending (save for the first six days), the published tariff had contained the unlawful allowance solely because of the Court's injunction. To sustain the contention of appellant that the provision for allowances in the published tariff limited the authority of the court to prevent their payment would be to clothe a published tariff, in existence solely by reason of equitable intervention, with an immunity from equity itself. The Interstate Commerce Act grants no such immunity.[12]

Third. The appellant takes the position that the Commission's purported postponement of its command to cease and desist (eighteen months after the interlocutory injunction was granted) deprived the Court of authority to enforce the conditions of its interlocutory injunction. However, since the Court had exercised jurisdiction to review and suspend the Commission's report and order, the administrative body was without power to act inconsistently with the Court's jurisdiction, had it attempted to do so.[13] But, since the Commission had already been enjoined from enforcing its

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[11] 49 U. S. C. § 6(7).

[12] Cf., Warehouse Co. v. United States, 283 U. S. 501, 511.

[13] Cf., Ford Motor Co. v. Nat'l Labor Relations Board, *supra*. It is, therefore immaterial that in No. 228 there were consecutive purported postponements of the command to cease and desist, each entered by the Commission before the expiration of the postponement immediately preceding.

report and order when it entered its postponement, there is no reason to construe the Commission's action as anything more than a recognition of the postponement actually effected by the Court's interlocutory injunction.

In addition, there were two separate aspects to the action of the Commission. It found an illegal practice in existence that involved unlawful disbursement of the Railroad's funds, contrary to the public interest. The Commission also entered a cease and desist order to operate prospectively. Even if the Commission's postponement of the cease and desist portion of its order had been operative, the Commission specifically left in effect its ruling that the allowance was unlawful.[14]

The Commission had exercised its primary jurisdiction and had found the allowances unlawful; upon review, the District Court properly approved this finding; the amount in the special allowance account was exactly known and undisputed; this fund could have belonged only to the Railroad or to appellant; the Railroad was in possession of the fund and in equity and good conscience was entitled to retain it. Therefore, there was no necessity to take evidence, and the action of the District Court in disposing of the fund required no additional findings. The final decree of the District Court properly directed that the unlawful allowances should not be paid to appellant, and should be retained by the Railroad.

The questions presented in No. 228 are governed by our conclusions here, and the judgments in both cases are

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[14] Cf. Terminal Warehouse v. Penn. R. Co., 297 U. S. 500, 507, 508. A suit at law based on a past alleged discriminatory practice may be stayed in order to permit the plaintiff to obtain the necessary preliminary ruling by the Commission. See Morrisdale Coal Co. v. Penna. R. R. Co., 230 U. S. 304; Mitchell Coal & Coke Co. v. Penn. R. R. Co., *supra*; So. Ry. Co. v. Tift, 206 U. S. 428.